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10 **UNITED STATES DISTRICT COURT**  
11 **FOR THE CENTRAL DISTRICT OF CALIFORNIA**

12 ERIC BROWN, an individual,  
13 Plaintiff(s),

14 vs.

15 JONES LANG LASALLE  
16 AMERICAS, INC.; DOES 1 to 10,  
17 Defendant(s).

Case No. 2:15-cv-03883 SJO (FFMx)  
[Assigned to Hon. S. James Otero]

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PLAINTIFF'S *EX PARTE*  
APPLICATION FOR AN ORDER (1)  
EXCUSING PLAINTIFF'S LATE-  
FILED OPPOSITION PAPERS AND  
PROCEDURAL DEFECTS IN  
PLAINTIFF'S SUBMITTED  
EVIDENCE TO DEFENDANT'S  
MOTION FOR SUMMARY  
JUDGMENT OR SUMMARY  
ADJUDICATION; (2) STRIKING  
JLL'S OBJECTIONS TO AND  
MOTIONS TO STRIKE; AND (3)  
SEALING THE EVIDENCE TO  
WHICH JLL ASSERTS AN  
ATTORNEY-CLIENT PRIVILEGE  
OBJECTION UNTIL THE COURT IS  
ABLE TO RULE ON THE ISSUE.**

[Filed concurrently with the Notice,  
Declaration of Pam Teren and

[PROPOSED] Order]  
Trial Date: June 28, 2016  
Complaint Filed: April 7, 2015

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Memorandum of Points and Authorities in Support of Plaintiff's *Ex Parte* Application For An Order (1) Excusing Plaintiff's Late-Filed Opposition Papers And Procedural Defects In Plaintiff's Submitted Evidence To Defendant's Motion For Summary Judgment Or Summary Adjudication; (2) Striking JLL's Objections to And Motions to Strike; And (3) Sealing The Evidence To Which JLL Asserts An Attorney-Client Privilege Objection Until The Court Is Able To Rule On The Issue.

## TABLE OF CONTENTS

I.	<b>INTRODUCTION .....</b>	<b>1</b>
A.	<b>Background Relevant Facts .....</b>	<b>1</b>
B.	<b>Reasons for this Ex Parte Application .....</b>	<b>2</b>
C.	<b>Relief Sought by this Ex Parte .....</b>	<b>4</b>
II.	<b>PROCEDURAL BACKGROUND .....</b>	<b>4</b>
A.	<b>The MSJ Filing Date .....</b>	<b>4</b>
B.	<b>MSJ Filed On April 6, 2016 With No Meet and Confer .....</b>	<b>5</b>
C.	<b>The Opposition Papers Were Filed Less Than Forty-Eight Hours After Plaintiff's Counsel Learned of Her Calendaring Error And Plaintiff's Counsel Immediately Offered To Stipulate To An Extension Of Time For JLL's Reply Brief And Informed JLL that She Would Seek Ex Parte Relief For Her Untimely Filing. ....</b>	<b>6</b>
D.	<b>Counsel Agreed to Mutual Withdrawal of Untimeliness Issues. ....</b>	<b>7</b>
E.	<b>JLL'S Counsel Demanded That Plaintiff Withdraw His Entire Opposition Because of Plaintiff's Counsel's New Alleged Rule 26 Violations. ....</b>	<b>7</b>
F.	<b>JLL'S Reply Papers Seek to Strike All of Plaintiff's Evidence. ..</b>	<b>10</b>
1.	<b>JLL Seeks to Strike Plaintiff's Counsel's Declaration i.e. the rest of Plaintiff's Evidence in Opposition to the MSJ on Alleged Rule 26(b)(5)(B) Violations .....</b>	<b>11</b>
2.	<b>JLL Seeks to Strike Plaintiff's Counsel's Declaration i.e. the rest of Plaintiff's Evidence in Opposition to the MSJ on Alleged Rule 26(b)(5)(B) Violations .....</b>	<b>13</b>
III.	<b>ARGUMENT .....</b>	<b>14</b>
A.	<b>Good Cause Exists for Plaintiff's Late-Filed Opposition and alleged Procedural and Authentication Defects including Plaintiff and his Counsel's Declaration and Attached Exhibits, Based On Excusable Neglect By Plaintiff's Counsel. ....</b>	<b>14</b>
1.	<b>The Late Filing of Plaintiff's Opposition.....</b>	<b>14</b>
2.	<b>Plaintiff's Counsel's Failure to include the Court Reporter Certifications. ....</b>	<b>16</b>

1                   3.     **JLL Was Not Prejudiced by Any Alleged Procedural or**  
2                         **Technical Defects .....17**  
3        B.     **Plaintiff Moves To Strike JLL’s Objections And Any New Matters**  
4               **Raised In JLL’s Reply Papers. ....19**  
5               1.     **It was not Plaintiff’s Burden to File a Motion For Relief**  
6                         **From JLL’s Unsupported Claim of Privilege and Inadvertent**  
7                         **Production. ....19**  
8        IV.    **CONCLUSION.....22**

# **TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Accardi v. Superior Court</i> 17 Cal.App.4th 341 (1993).....	21
<i>Ahanchian v. Xenon Pictures, Inc.</i> , 624 F.3d 1253 (9th Cir. 2010).....	passim
<i>Birchstein v. New United Moto Mfg., Inc.</i> 92 Cal.App.4th 994 (2001).....	21
<i>Briones v. Riviera Hotel &amp; Casino</i> , 116 F.3d 379 (9 <sup>th</sup> Cir. 1997) .....	15
<i>Callan v. Christian Audigier, Inc.</i> , 263 F.R.D. 564 (C.D. Cal. 2009).....	20
<i>Cordova v. State Farm Ins. Co.</i> (9th Cir. 1997) 124 F.3d 1145 .....	21
<i>Gebretsadike v. Travelers Home &amp; Marine Ins. Co.</i> , 103 F.Supp.3d 78, 86 (D. D.C. 2015) .....	21
<i>Lemoge v. U.S.</i> , 587 F.3d 1188 (9 <sup>th</sup> Cir. 2009) .....	17
<i>Maljack Prods., Inc. v. GoodTimes Home Video Corp.</i> 81 F3d 881 (9th Cir. 1996).....	17
<i>Martinez v. Stanford</i> , 323 F.3d 1178 (9th Cir. 2003).....	18
<i>Mogilefsky v. Superior Court</i> , 20 Cal.App.4th 1409 (1993).....	21
<i>Orr v. Bank of America</i> , 285 F.3d 764 (9 <sup>th</sup> Cir. 2002) .....	16, 17
<i>Pioneer Inv. Servs. V. Brunswick Assocs. Ltd. P’ship</i> , 507 U.S. 380, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993).....	15
<i>QBAS Co v. C Walters Intercostal Corp.</i> , 2010 U.S. Dist. LEXIS 143945 (C.D. Cal. 2010) .....	17

## **iii**

Memorandum of Points and Authorities in Support of Plaintiff’s *Ex Parte* Application For An Order (1) Excusing Plaintiff’s Late-Filed Opposition Papers And Procedural Defects In Plaintiff’s Submitted Evidence To Defendant’s Motion For Summary Judgment Or Summary Adjudication; (2) Striking JLL’s Objections to And Motions to Strike; And (3) Sealing The Evidence To Which JLL Asserts An Attorney-Client Privilege Objection Until The Court Is Able To Rule On The Issue.

1 *Richards v. CH2M Hill, Inc.*  
2 26 Cal.4th 798 (2001).....21  
3  
4 *Singleton v. U.S. Gypsum Co.,*  
5 140 Cal.App.4th 1547 .....21  
6  
7 *Springs Industries, Inc. v. American Motorists Ins. Co.*  
8 137 FRD 238 (ND TX 1991).....21  
9  
10 *Zamani v. Carnes,*  
11 491 F.3d 990 (9<sup>th</sup> Cir. 2007) .....19  
12  
13 **OTHER AUTHORITIES**  
14 Federal Rule of Evidence 502(b).....20  
15  
16 FRCP 26(5)(B).....19  
17  
18 FRCP 26(b)(5)(B).....8, 13, 19, 20  
19  
20 Local Rule 7 .....14  
21  
22 Local Rule 56.1(d).....17  
23  
24 Order (1) .....7  
25  
26 Page 4, “III Specific Objections” .....12  
27  
28 Rule 26 .....1, 7, 8, 19  
Rule 56 .....18  
Rule 26(f).....5

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 **A. Background Relevant Facts**

4 This *ex parte* application was initially intended to seek relief from the Court  
5 for the late-filing by counsel for Plaintiff Eric Brown (“Plaintiff” or “Brown”) of his  
6 Opposition papers (“Opposition”) on April 21, 2016 to the motion for summary  
7 judgment, or in the alternative, summary adjudication (“MSJ”) filed by defendant  
8 Jones Lang LaSalle Americas, Inc. (“Defendant” or “JLL”) due to Plaintiff’s  
9 counsel’s admitted calendaring error. It is now expanded to seek additional relief,  
10 based on procedural and technical objections JLL raises and on which JLL urges the  
11 Court to disregard Plaintiff’s entire Opposition, refuse to consider any of Plaintiff’s  
12 evidence and dismiss Plaintiff’s entire case without even reaching the merits.

13 As to the untimely filing of Plaintiff’s Opposition to MSJ, while Plaintiff’s  
14 counsel acknowledges her calendaring error, Plaintiff submits that the error was  
15 based on excusable neglect and, to the extent any punishment for the error should  
16 occur, it should be against Plaintiff’s counsel personally, as opposed to the dismissal  
17 of Plaintiff’s meritorious claims. Counsel for the parties had long ago agreed to  
18 provide Plaintiff’s counsel time well above the minimum 8 days for opposing  
19 motions in the event that JLL filed a summary judgment motion. This is evidenced  
20 by the parties Joint Rule 26 report which provided Plaintiff’s counsel with over a  
21 month to prepare and file an opposition.

22 It was not until late-March 2016, when JLL first asked about a briefing  
23 schedule on its MSJ, proposing the minimum notice possible based on JLL filing its  
24 MSJ during the first and second weeks of April. Plaintiff’s counsel informed JLL’s  
25 counsel that it would be impossible for her, a solo attorney with very limited support  
26 staff, to prepare his Opposition during that time frame due to the commitments on

1 this case, jury trials set on April 18<sup>th</sup> and April 25<sup>th</sup> in other cases, a respondent's  
2 brief filing deadline on April 15<sup>th</sup> and multiple other deadlines.

3 When Plaintiff's counsel received the Pacer notification of JLL's filing late  
4 on April 6, 2016, she checked the Rutter Guide to calendar the Opposition due date.  
5 However, Plaintiff's counsel somehow misread the due date to be 14 days before the  
6 hearing rather than 21 days, and calendared the Opposition response date for April  
7 25, 2016. On the evening of April 19 2016, JLL's Counsel inquired whether  
8 Plaintiff was opposing the motion since the Opposition was not filed, at which time  
9 Plaintiff's counsel realized her error. Plaintiff's counsel then worked non-stop until  
10 filing the Opposition on April 21<sup>st</sup> sleeping three hours total during that time.

11 Upon filing the Opposition, Plaintiff's counsel immediately requested the  
12 consent of JLL's counsel to mutually withdraw the untimeliness issues raised by  
13 both parties with regard to the timeliness of filing their papers and offered to  
14 stipulate to extend the hearing date so that JLL and the Court would not be  
15 prejudiced by the error. While JLL's Counsel indicated that JLL did not need an  
16 extension of time and agreed to mutually withdraw untimeliness objections, JLL's  
17 Counsel scolded Plaintiff's counsel for having raised procedural defects in JLL's  
18 MSJ in the first place and reminding Plaintiff's counsel that courts prefer to resolve  
19 motions on the merits.

20 **B. Reasons for this Ex Parte Application**

21 Plaintiff now seeks relief for the untimely filing of his Opposition, as well as  
22 other procedural errors and objections because JLL, by and through its counsel, in  
23 its Reply, urge the Court to disregard Plaintiff's Opposition and to refuse to consider  
24 any of Plaintiff's submitted evidence, and dismiss Plaintiff's entire case based on  
25 procedural defects, including the late filing of Plaintiff's Opposition. Specifically,  
26 JLL asks the Court to:



1 (1) Strike all of Plaintiff's evidence on procedural and authenticity objections  
2 (by failing to include the court reporter certifications for depositions cited by  
3 Plaintiff's counsel, despite all but one deposition transcript had already been  
4 authenticated by JLL, claiming lack of authentication of documents produced by  
5 JLL, and striking the declarations of Plaintiff and his counsel);

6 (2) Reject the parties' agreement to waive untimeliness objections but impose  
7 the sanctions for untimely filings on Plaintiff alone as to the erroneous e-filing of  
8 Plaintiff Eric Brown's declaration that was done at the same time as the other  
9 Opposition papers which were excused, while permitting JLL lenience on it's late  
10 filings as to JLL's Objections and Motions to Strike Plaintiff and his counsel's  
11 declarations; and

12 (3) Strike Plaintiff's entire Opposition and all of Plaintiff's evidence because  
13 Plaintiff's counsel included and discussed the document previously produced by  
14 JLL, bate stamped "JLL 133" (an email between two non-lawyers wherein no legal  
15 advice is sought or mentioned, which "cc's" JLL's in-house attorney, Laura  
16 Garofalo ("Garofalo"). JLL contends this single e-mail is protected by the attorney-  
17 client privilege but was "inadvertently produced" to Plaintiff in November 2015.  
18 JLL contends that upon its mailing of the letter to Plaintiff on March 23, 2016,  
19 informing Plaintiff's Counsel of its inadvertent production as to 12 documents, it  
20 became Plaintiff's burden to file a motion for relief from JLL's objection to its  
21 admitted waiver, and that Plaintiff's failure to obtain this relief and subsequent  
22 public filing and reliance on document JLL 133 requires that Plaintiff's entire  
23 Opposition and all of Plaintiff's evidence opposing JLL's MSJ must be stricken,  
24 thereby requiring dismissal of Plaintiff's case. JLL 133 is part of a workers'  
25 compensation communication log comprised of pages JLL 132-144. The documents  
26 in this log (JLL 132-144): (1) were heavily redacted by JLL's counsel when

1 originally produced in November 2015, without redactions on JLL 133; (2) were  
2 identified in JLL's privilege log on February 29, 2016, but not JLL 133; (3) were  
3 marked as an exhibit to McCorry's deposition on March 22, 2016 (defended by Ms.  
4 Falcone and attended by JLL's in-house counsel); (4) were the subject of substantial  
5 questions to McCorry, which JLL's counsel raised no privilege objections and  
6 mentioned nothing about the alleged discovery of the inadvertent production at her  
7 deposition that Ms. Falcone claims she discovered in her Supplemental Declaration  
8 while preparing for McCorry's deposition.

9 **C. Relief Sought by this Ex Parte**

10 By this *ex parte* application, Plaintiff seeks:

- 11 1. Relief from the late-filed Opposition, including, Plaintiff's Notice of  
12 Erratas filed in connection with Plaintiff's and Pamela McKibben Teren's  
13 declaration, in response to alleged procedural defects and authentication issues,  
14 including, as to JLL 133, deposition testimony cited and relied upon, and relief from  
15 other alleged technical defects in Plaintiff's submitted evidence such that the Court  
16 considers Plaintiff's Opposition and supporting evidence in ruling on JLL's MSJ;
- 17 2. Striking JLL's Objections and Motion to Strike the declarations of  
18 Plaintiff Eric Brown and Pamela McKibben Teren; and
- 19 3. Sealing the evidence to which JLL asserts an attorney-client privilege  
20 objection until the Court is able to rule on the issue.

21 **II. PROCEDURAL BACKGROUND**

22 **A. The MSJ Filing Date**

23 Plaintiff filed this lawsuit over one year ago. The parties agreed, via the Joint  
24 Report, that JLL's MSJ would be filed by March 26, 2016 and that Plaintiff would  
25 be afforded over 4 weeks from the service of a MSJ to prepare and file an  
26 opposition.

1 In JLL's *ex parte* application filed on March 10, 2016, JLL unequivocally  
2 represented repeatedly to the Court that JLL's "anticipated Motion for Summary  
3 Judgment, based on the parties' Joint Rule Rule 26(f) Report, is due for filing on  
4 March 26, 2016." *See*, (Docket #13). JLL expressly sought, *inter alia*, a thirty-day  
5 extension of JLL's deadline to file its MSJ, from March 26, 2016 to April 26, 2016,  
6 which was denied by this Court on March 16, 2016. (Docket #21). The parties also  
7 agreed, and Plaintiff relied on the agreement, that Plaintiff would be provided at  
8 least three weeks to prepare his Opposition.

9 **B. MSJ Filed On April 6, 2016 With No Meet and Confer**

10 JLL's MSJ was filed after the March 26, 2016 deadline, without engaging in  
11 any meet and confer, at a time Plaintiff's counsel, a solo practitioner, had informed  
12 JLL's counsel that it would be impossible for her to prepare an opposition. (Teren  
13 Decl. ¶15, Exh. "D"). Plaintiff's counsel anticipated that preparing an opposition  
14 would require at least seven long days dedicated solely to preparing the opposition  
15 and knew that this amount of time simply did not exist given her other obligations.  
16 Teren Decl. ¶16. This was the extent of JLL's pre-filing meet and confer.

17 JLL's MSJ contains 31 issues and the Separate Statement of Facts exceeds  
18 300 pages and the supporting evidence came in 40 separate electronic files, each of  
19 which had to be downloaded individually and reconnected in sequential order to  
20 correspond with the appropriate declaration. ( Teren Decl. ¶18). As Plaintiff's  
21 counsel downloaded the 40+ electronic files, she reviewed the Rutter Guide to  
22 calendar the opposition due date, but incorrectly read the rules and erroneously  
23 understood and believed that Plaintiff's Opposition was due 14 days before the  
24 hearing, April 25, 2016.<sup>1</sup> (Teren Decl. ¶¶16-18).

25 \_\_\_\_\_  
26 <sup>1</sup> Indeed, the same mistake was made by the Plaintiff in *Ahanchian v. Xenon Pictures, Inc.*, 624  
27 F.3d 1253, 1259, fn.6 (9th Cir. 2010). citing the unique and shortened timeline of the Central  
District where other Districts in the circuit guarantee at least fourteen days to file Oppositions.

1 Plaintiff's counsel rearranged her schedule to dedicate her time from the  
2 afternoon of April 15<sup>th</sup>- the morning of April 21<sup>st</sup> and April 25<sup>th</sup> to preparing and  
3 filing Plaintiff's Opposition. Plaintiff's counsel believed she was on track to timely  
4 file the Opposition. Indeed, when JLL's Counsel asked Plaintiff's counsel in the  
5 afternoon on April 14, 2016, if she wanted to dismiss any of Plaintiff's claims,  
6 Plaintiff's Counsel informed her that she had not even had time to read the MSJ, and  
7 that she had dedicated the up-coming week-end and the following week to preparing  
8 the Opposition. (Teren Decl. ¶¶19-29).

9 **C. The Opposition Papers Were Filed Less Than Forty-Eight Hours**  
10 **After Plaintiff's Counsel Learned of Her Calendaring Error And**  
11 **Plaintiff's Counsel Immediately Offered To Stipulate To An**  
12 **Extension Of Time For JLL's Reply Brief And Informed JLL that**  
13 **She Would Seek Ex Parte Relief For Her Untimely Filing.**

14 Plaintiff's counsel learned of her calendaring error in the evening on Tuesday,  
15 April 19, 2016, via an email from JLL's Counsel asking if Plaintiff would oppose  
16 JLL's motion given that no papers were filed by the due date of Monday, April 18,  
17 2016. (Teren Decl. ¶21). Plaintiff's counsel then rushed to complete and file  
18 Plaintiff's Opposition briefing (consisting of over 400 pages) on April 21, 2016 (on  
19 less than three hours of sleep). (Teren Decl. ¶¶21-22). Unbeknownst to Plaintiff's  
20 Counsel, when she e-filed Plaintiff's Declaration, she mistakenly submitted a second  
21 copy of her own declaration, even though the title of the document submitted was  
22 correct.

23 Immediately after filing the Opposition on Thursday, April 21, 2016,  
24 Plaintiff's counsel shared a Dropbox link with a courtesy copy of the filing to JLL's  
25 Counsel. (Teren Decl. ¶22, Exh. "G."). Plaintiff's counsel also sent JLL's Counsel  
26 an email explaining her incorrect reading of the rule and requested that JLL consent  
27 to the late-filed Opposition and stipulate to the extended time in which to reply  
28 and/or continue the hearing date so neither JLL or the Court are prejudiced. (Teren

Decl. ¶22, Exh. “G.”) Plaintiff’s counsel indicated that she would be filing an *ex parte* application for an Order (1) excusing Plaintiff’s late-filed Opposition to JLL’s MSJ for good cause based on excusable neglect; and (2) extending the time for Defendant’s Reply and/or continue the hearing date on JLL’s MSJ. The email concluded by asking JLL’s Counsel to advise Plaintiff’s counsel at their earliest convenience of their position on this and if they had any difficulty accessing the Dropbox to contact Plaintiff’s counsel. The correct copy of Brown’s declaration was in the Dropbox folder. (Teren Decl. ¶¶22-23).

**D. Counsel Agreed to Mutual Withdrawal of Untimeliness Issues.**

On Thursday evening, JLL’s Counsel responded to Plaintiff’s counsel’s email seeking JLL’s consent to Plaintiff’s late-filed MSJ Opposition, stating that JLL would consent to Plaintiff’s late-filing if Plaintiff withdrew his argument that JLL’s motion was untimely. (Teren Decl. ¶22, Exh. “G.”) Plaintiff’s counsel immediately agreed to that condition. *Id.* JLL’s counsel further stated that it did not need require additional time to file its Reply brief and, given the brevity of the Court’s page allotment for the reply, JLL will file its reply brief on time, by Monday, April 25, 2016 at 5 p.m., so no *ex parte* relief is necessary on JLL’s behalf. *Id.* JLL’s Counsel stated:

“We think the Court would appreciate the parties granting each other mutual courtesies, and (as you know) most courts prefer to decide motions on their merits.”

*Id.*

**E. JLL’S Counsel Demanded That Plaintiff Withdraw His Entire Opposition Because of Plaintiff’s Counsel’s New Alleged Rule 26 Violations.**

Approximately two hours after JLL’s Counsel’s email of April 21, 2016, JLL’s Counsel commenced a series of e-mail communications to Plaintiff’s counsel

1 demanding that she withdraw her entire Opposition based on newly claimed Rule 26  
2 violations. On Thursday, April 21, 2016, at 10:20 p.m. JLL's Counsel (David  
3 Feingold) sent an email stating:

4  
5 "[W]e noted Plaintiff referred, numerous times, to communications among  
6 Laura Garofalo, Brian Cheske, and Laura McCorry. Those conversations  
7 were attorney-client privileged. We informed you of that in the attached  
8 letter, sent on March 23, 2016, and asked you to (1) dispose of the original  
9 Hartford notes file containing the privileged communications and (2) replace  
10 it with a properly redacted version Bates stamped "JLL000751" through  
11 "JLL000764." Plaintiff's reliance on Ms. Garofalo's privileged  
12 communications, our notice to you nearly a month ago notwithstanding, is  
13 improper and in direct violation of FRCP 26(b)(5)(B), which required you  
14 "promptly return, sequester, or destroy the specified information" and not use  
15 it. Accordingly, please immediately withdraw Plaintiff's Opposition and  
16 strike all references to Ms. Garofalo's communications, both in the  
17 Opposition itself and in Plaintiff's supporting evidence."

18 (Teren Decl. ¶28, Exh. "I.")

19 Plaintiff's counsel responded on Friday, April 22, 2016 at 10:16 a.m. that she  
20 was "about to get on a plane and would not have access to wi-fi- I do not believe I  
21 relied on anything privileged but will review this when I'm back on Monday." *Id.*  
22 Less than two hours later, JLL's Counsel (Elizabeth Falcone) emailed:

23 "Pam, you clearly relied on the documents we indicated were privileged and  
24 requested by destroyed. This is a serious issue. It needs to be handled  
25 immediately. Please do so. We expect a notice of withdrawal filed."

26 *Id.*

27 On Monday, April 25, 2016, Plaintiff's Counsel sent a detailed letter  
28 responding to JLL's new claims. (Teren Decl. ¶29, Exh. "E.") In her letter,  
Plaintiff's Counsel requested clarification as to what documents JLL claimed were  
privileged because of the three pages, JLL 132, 133 and 141, cited in Plaintiff's  
Opposition, two of them had no redactions even in the "new" set JLL provided.



1 Further, the set of documents JLL contends are privileged were originally produced  
2 in November 2015, in heavily redacted form, making it clear that they were  
3 carefully analyzed by JLL's counsel. Additionally, when JLL produced a privilege  
4 log months later, the log identified pages from the same set of documents (JLL 132-  
5 144) as privileged, but did not include JLL 133, 133 or 141 in the list of identified  
6 privileged documents. Indeed, at no time did JLL ever provide a privilege log  
7 including the newly claimed privileged documents set forth in the March 23, 2016  
8 letter. Finally, Plaintiff's counsel pointed out that the email on JLL 133 from Cheske  
9 to Jobson, two non-lawyers, does not seek or offer anything resembling legal advice  
10 but rather, merely "cc's" Garofalo, who Plaintiff's counsel learned through a Google  
11 search, was JLL's in-house counsel. *Id.* Plaintiff's counsel concluded her letter by  
12 stating:

13 "That being said, given the late timing of this issue being raised, the huge  
14 flurry of work between March 28-April 21, 2016, I had not realized this issue  
15 had been raised when filing the Opposition. Had I realized this, I would have  
16 raised the issue with you and agreed to file the single page separately so that  
the court could make the determination of the issue.

17 I don't believe that Plaintiff's entire opposition has to be withdrawn, but I am  
18 willing to work with you on a reasonable methodology to address the issue  
19 being raised. To that end, please let me know what you propose that is  
20 something less than an entire withdrawal of the opposition. Some possible  
suggestions:

- 21 1) I could file a request that the court seal the pages JLL 133 and those  
22 pages referencing this document, which are quite limited; and/or
- 23 2) We could request a separate hearing to permit the court to address  
24 whether the privilege applies to this document.

25 Let me know your thoughts on this."

26 *Id.*

1 On April 27, 2016, JLL's Counsel responded. JLL acknowledged that the  
2 only purported privileged communication boiled down to one document, JLL 133 in  
3 which Garofalo was carbon-copied on an email between Cheske and The Hartford's  
4 employee, Jobson. However, JLL still claims it is privileged:

5  
6 "Although not visible in the Notes file, Mr. Cheske forwarded a privileged  
7 request from Ms. Garofalo. Indeed, if you look at copies of the original  
8 emails, you will see we redacted Ms. Garafalo's direct communications with  
9 Mr. Cheske that led up to his email to Mr. Jobson. (See, JLL 687-689). In  
10 other words, Mr. Cheske was not simply copying Ms. Garafalo on his email,  
11 as you suggest; rather, his email was part and parcel of a privileged  
12 communication with Ms. Garofalo.... We did not redact Mr. Jobson's April 2,  
2015 response to Mr. Cheske because that email merely reflects an update on  
Plaintiff's condition. Further, as you note, Mr. Jobson did not copy Ms.  
Garofalo, so the communication is not, on its face, privileged."

13 (Teren Decl. ¶31, Exh. "J.")

14 Based on this, JLL's Counsel demands that Plaintiff refile his Opposition and  
15 Plaintiff's Counsel's declaration after excising all factual assertions and any  
16 arguments that rely on the privileged communication; refile a notice of withdrawal  
17 and request to seal the original Opposition and her supporting declaration.  
18 Plaintiff's Counsel responded a few hours later with a 12-page letter detailing the  
19 course of events, setting forth the legal basis for her position and again suggesting  
20 that the parties request that the Court place JLL 133 under seal until the matter is  
21 resolved and seal any other portions of the filings JLL is concerned about.  
22 Plaintiff's Counsel provided notice that she was filing this *ex parte* application.

23 (Teren Decl. ¶32, Exh. "K.")

24 **F. JLL'S Reply Papers Seek to Strike All of Plaintiff's Evidence.**

25 JLL e-filed its Reply papers ("Reply") to Plaintiff's Opposition, on April 25,  
26 2016 consisting of: (1) JLL's Reply brief; (2) JLL's Objections to and Motion to



1 Strike the Declaration of Pamela McKibbin Teren (“JLL Objections”); and (3)  
2 Supplemental Declaration of Elizabeth Falcone in support of JLL’s Objections to  
3 and Motion to Strike Plaintiff’s Counsel’s Declaration. (Docket #41-43).

4 1. **JLL Seeks to Exclude Brown’s Declaration Initially Due**  
5 **Solely to an E-Filing Error by Plaintiff’s Counsel and all**  
6 **Deposition Exhibits Attached to Plaintiff’s Counsel’s**  
7 **Declaration Because the Court Reporter’s Certifications**  
8 **were not Attached.**

9 After acknowledging the parties’ mutual withdrawal of their timeliness issues,  
10 Footnote 1, Page 1 of JLL’s Reply directs the Court to review Falcone’s Initial and  
11 Supplemental Declaration that provides additional “support” of the moot issue that  
12 JLL did not file its MSJ late. Footnote 2, Page 2 of JLL’s Reply also raised -- for  
13 the first time -- that the document e-filed and labeled as Eric Brown’s Declaration  
14 mistakenly was uploaded as Plaintiff’s counsel’s Declaration. JLL objected to  
15 Plaintiff’s anticipated correction of this error stating:

16 “Brown’s Opposition states he filed a declaration in support of his  
17 opposition, and that it shows that Cordero suspended someone. However,  
18 Dkt. No. 36 is not a declaration by Brown as its ECF title states. It is a  
19 duplicate of Brown’s counsel’s declaration. Should Brown belatedly file a  
20 declaration, JLL intends to object.”

21 Docket #36.

22 JLL’s Counsel emailed on Sunday, April 24, 2016 at 4:09 p.m., that she could  
23 not access the Dropbox while Plaintiff’s counsel was out of town, but did not  
24 indicate any issues with Brown’s declaration. (Teren Decl. ¶24, Exh. “H.”) As soon  
25 as Plaintiff’s counsel learned of the e-filing error on Tuesday, April 26, 2016, she  
26 immediately re-filed it. (Docket #46). JLL’s Counsel filed JLL’s Objections to  
27 Plaintiff’s corrected filing of Brown’s declaration the following day, asking the  
28 Court to strike Brown’s entire declaration for procedural defects, including, his e-  
signature on the declaration. (Docket #47).

1       Upon reviewing the Reply papers and the Court's docket, Plaintiff's counsel  
2 also discovered that JLL's Counsel similarly erred in its e-filing of JLL's Objections  
3 to and Motion to Strike Plaintiff's counsel's Declaration. Only eight of the eighteen  
4 pages were filed. (Docket #42). Indeed, the last ten pages which began on Page 4,  
5 "III Specific Objections" which were not filed, contained the crux of JLL's  
6 objections. Plaintiff's counsel immediately notified JLL's Counsel, requested that  
7 they stipulate to waive the mutual e-filing errors and requested a copy of the missing  
8 pages. (Teren Decl. ¶30, Exh. "F.") JLL's Counsel's only response was to accuse  
9 Plaintiff's counsel of "mud-slinging." *Id.* JLL's Counsel then filed a "Notice of  
10 Errata" attaching JLL's corrected Objections several hours later. Docket #45-1.

11       Upon reviewing the remainder of JLL's Objections, Plaintiff's counsel  
12 learned, for the first time, that JLL was objecting to all of the deposition transcripts  
13 attached to Plaintiff's counsel's Declaration because each of them did not include  
14 the reporter's certification. Plaintiff's counsel promptly filed a Notice of Errata re:  
15 Original Filing of the Declaration of Eric Brown and Deposition Citations Attached  
16 to Teren's Declaration. In it, Plaintiff's Counsel stated that "Plaintiff does not  
17 object to the Court's consideration of the corrected document JLL filed due to what  
18 appears to be a similar, inadvertent error."

19       Likewise, Plaintiff's counsel attached as Exhibit "A" to the Notice of Errata,  
20 the court reporters' certifications for the depositions cited in Plaintiff's counsel's  
21 declaration. She stated that "Until receiving JLL's complete document, Plaintiff  
22 was unaware that JLL had an objection to the use of deposition transcripts for  
23 depositions their counsel took and attended and was unaware of a requirement to  
24 include the reporter's certification in addition to counsel's declaration" and  
25 immediately rectified it. Docket #46. Plaintiff's counsel immediately emailed  
26 courtesy copies of the Notice of Errata and Brown's Declaration to JLL's Counsel.

2. **JLL Seeks to Strike Plaintiff's Counsel's Declaration i.e. the rest of Plaintiff's Evidence in Opposition to the MSJ on Alleged Rule 26(b)(5)(B) Violations**

JLL essentially seeks to strike the rest of Plaintiff's evidence submitted in support of Plaintiff's Opposition in its Objections by claiming that Plaintiff's Counsel violated FRCP 26(b)(5)(B). JLL's argument is based on one email in document JLL 133. JLL contends this email is an attorney-client privileged communication, which it inadvertently produced in November 2015, and inadvertently failed to identify in its February 29, 2016 privilege log or any other. (Teren Decl. ¶¶2-7.) JLL's Counsel claimed to have discovered the privileged material while preparing for McCorry's March 22, 2016 deposition. However, JLL's Counsel said nothing about it when Plaintiff's counsel marked the set of documents JLL 132-144 as Exhibit 2 to McCorry's deposition and questioned McCorry extensively about these documents. (Teren Decl. ¶¶8-10.)

JLL then contends that Plaintiff's Counsel will probably claim ignorance of the federal rules because "(she has claimed ignorance of many federal rules throughout this case, despite her 25+ admission to the bar)," attaching a copy of Plaintiff's Counsel's bar record, concluding that "[t]he consequence of Brown's failure to comply with Rule 26(b)(5)(B) is that he cannot use this information on summary judgment." (JLL's Objections, Exh. A, P.8-9). JLL's Counsel then cites multiple out-of-jurisdiction cases, claiming that Brown is precluded from using the admittedly waived documents, while ignoring the controlling California and Ninth Circuit decisions which reject JLL's position. *Id.* at lines 9-15.

1 **III. ARGUMENT**

2 **A. Good Cause Exists for Plaintiff's Late-Filed Opposition and**  
3 **alleged Procedural and Authentication Defects including Plaintiff**  
4 **and his Counsel's Declaration and Attached Exhibits, Based On**  
5 **Excusable Neglect By Plaintiff's Counsel.**

6 **1. The Late Filing of Plaintiff's Opposition.**

7 Although both parties stipulated to withdraw claims of untimeliness as to their  
8 mutual MSJ filings, JLL's Reply (in footnotes 1 and 2) indicates that (1) JLL  
9 objects, for no stated reason, to the re-filing of Brown's Declaration erroneously  
10 filed on April 21, 2016 with the rest of the excused late filings, and then files  
11 untimely Objections and Motions to Strike Brown's declaration for additional  
12 undisclosed issues; (2) JLL continues to provide evidentiary support to refute the  
13 moot issue as to JLL's late filing of the MSJ; and (3) JLL objects to all of the  
14 deposition testimony attached to Plaintiff's Counsel's declaration because it did not  
15 include court reporter certifications, which was promptly rectified, and as to all but  
16 one, were previously authenticated by JLL. Had JLL conducted a meet and confer  
17 in compliance with Local Rule 7 and the Court's Order, (para. 21(d)) in connection  
18 with the parties' supporting evidence, all of JLL's Objections would have been  
19 raised and rectified in advance. Not only should JLL not be permitted to benefit by  
20 its own misconduct, obviously, Brown will be significantly prejudiced if his  
21 declaration and all of the evidence that he intends to rely upon to defeat JLL's MSJ  
22 were stricken.

23 The Ninth Circuit has explained that "good cause" is "a non-rigorous standard  
24 that has been construed broadly across procedural and statutory contexts."  
25 *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1259 (9th Cir. 2010). As to  
26 "excusable neglect," courts must "apply a four-factor equitable test, examining: (1)  
27 the danger of prejudice to the opposing party; (2) the length of the delay and its

1 potential impact on the proceedings; (3) the reason for the delay; and (4) whether the  
2 movant acted in good faith." *Id.* at 1261, citing *Pioneer Inv. Servs. V. Brunswick*  
3 *Assocs. Ltd. P'ship*, 507 U.S. 380, 395, 113 S.Ct. 1489, 123 L.Ed.2d 74 (1993);  
4 *Briones v. Riviera Hotel & Casino*, 116 F.3d 379, 381 (9<sup>th</sup> Cir. 1997). The test "is at  
5 bottom an equitable one, taking account of all relevant circumstances surrounding  
6 the party's omission." *Pioneer*, 507 U.S. at 395. In applying the analysis, courts  
7 "cannot create or apply any 'rigid legal rule against late filings attributable to any  
8 particular type of negligence[ ]'" by "impermissibly adopting a per se rule in  
9 applying the *Pioneer/Briones* balancing test." *Id.* at 1261-62.

10       Excusable neglect only considers the prejudice to the opposing party, which  
11 in this case, is an issue for JLL. JLL voluntarily agreed to file its reply on time and  
12 waive timeliness issues. Plaintiff's counsel filed the Opposition papers less than 48  
13 hours after she learned of the error, less than two days after the deadline, and  
14 immediately sent a link with all of the documents to JLL's Counsel and offered to  
15 file this *ex parte* stipulating to an extension of time so that neither JLL or the Court  
16 would be prejudiced by Plaintiff counsel's error.

17       Within hours of Plaintiff's e-filing, JLL's Counsel began emailing Plaintiff's  
18 counsel about the Opposition papers. Yet, at no time, up to and including, when  
19 JLL e-filed its Reply on Monday, April 25, 2016, did JLL's Counsel mention the e-  
20 filing error as to Brown's Declaration. Even if JLL's Counsel waited to access the  
21 Dropbox until Sunday, April 24, 2016, the folder contained Brown's declaration.  
22 Yet, it would not have made any difference because JLL's Counsel already knew of  
23 the Brown declaration filing error and intended to capitalize on it. Ironically, when  
24 Plaintiff's counsel discovered that JLL's e-filed Objections were incompletely filed,  
25 instead of hiding this fact from JLL's Counsel, Plaintiff's Counsel immediately  
26 notified them of the error and offered to stipulate to mutually waiving objections to

1 the erroneously filed documents. JLL's Counsel ignored Plaintiff's offer, filed a  
2 "Notice of Errata," as if to fully excuse JLL's own error, accused Plaintiff's counsel  
3 of "mud-slinging" for her email notifying JLL of their error, and then filed untimely  
4 set of Objections to Brown's declaration which included objecting to Brown's e-  
5 signature that now requires a second Notice of Errata to submit Plaintiff's signature.

6 The declaration of Plaintiff's counsel, Teren, explains the reason for the late-  
7 filed opposition; that she inadvertently calendared the opposition date for 14 days  
8 from the hearing date based on a misreading of the local rules. As soon as JLL's  
9 Counsel informed her that the Opposition was late, she immediately stayed up for  
10 two nights straight to promptly prepare and e-file the Opposition papers and  
11 immediately offered to stipulate and file this ex parte for an extension of time so that  
12 JLL and the Court would not be prejudiced by her mistake. Plaintiff's counsel  
13 details in her declaration that Plaintiff's failure to timely file the Opposition was not  
14 do to any fault of her client, Brown. The mistake was her own; it was inadvertent  
15 and by no means the product of bad faith, deviousness or malicious intent.  
16 Plaintiff's Counsel's inadvertent error in late-filing was not sufficiently egregious to  
17 warrant denying Plaintiff's Opposition entirely as JLL contends.

18 2. **Plaintiff's Counsel's Failure to include the Court Reporter**  
19 **Certifications.**

20 JLL also suffered no prejudice by Plaintiff's failure to include the court  
21 reporter's certifications with the cited portions of the transcripts. Notably, JLL  
22 relies on *Orr v. Bank of America*, 285 F.3d 764, 776 (9<sup>th</sup> Cir. 2002), as support for  
23 its objections and motion to strike all of the deposition transcripts attached to  
24 Plaintiff's Counsel's declaration based on her failure to include the reporter's  
25 certification (which has now been corrected). *Orr*, however, does not support JLL's  
26 position. *Orr* holds that when any documents have been authenticated by another  
27 party, the requirement of authenticity is satisfied as to that document with regard to



1 all parties on a summary judgment. Here, all of the depositions at issue except for  
2 the deposition of Ed Lane were cited and authenticated by JLL's counsel.  
3 Therefore, *Orr* confirms that JLL's objections lack merit and, in any event, Plaintiff  
4 immediately rectified the defect upon becoming aware of JLL's objection.<sup>2</sup>

5           3.     **JLL Was Not Prejudiced by Any Alleged Procedural or**  
6                 **Technical Defects**

7           "Prejudice requires greater harm than simply that relief would delay  
8 resolution of the case." *Lemoge v. U.S.*, 587 F.3d 1188, 1196 (9<sup>th</sup> Cir. 2009), citing,  
9 *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 701 (9<sup>th</sup> Cir. 2001). ("[M]erely  
10 being forced to litigate on the merits cannot be considered prejudicial for purposes  
11 of lifting a default judgment.")).

12           Under the circumstances, courts are resistant to "create or apply [a] rigid legal  
13 rule against late filings attributable to [Plaintiff's counsel's] error [by]  
14 impermissibly adopting a per se rule" that enforces Local Rule 56.1(d) under any  
15 situation regardless of application of the *Pioneer/Briones* balancing test. *See*,  
16 *Ahanchian, supra*, 624 F.3d at 1261-62. To rule otherwise is contrary to controlling

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17 <sup>2</sup> Falcone's Declaration filed in support of the MSJ included the following transcripts:

- 18 1. Plaintiff's Deposition, Volumes 1 and 2, Falcone Dec. para. 2, 3, Exhibits 1 and 2.  
19 2. Cordero Deposition, Falcone Dec., paras. 4 and 5 (errata sheet) and Exhibit 3.  
20 3. Paul Kim, MD Deposition, Falcone Dec., para. 6, Exhibit 5.  
21 4. Albert Simpkins, MD Deposition, Falcone Dec., para. 7, Exhibit 6.  
22 5. Laura McCorry Deposition, para. 13, Exhibit 11.  
23 6. William Quiroz Deposition, Falcone Dec., para. 14, Exhibit 12.  
24 7. Williams Deposition, Falcone Dec., para. 15, Exhibit 13.

25           The first six deposition transcripts were attached to Plaintiff's Counsel's declaration.  
26 In addition, to the extent JLL challenges the authentication of documents JLL produced, it is  
27 similarly defective. Documents produced by a party in discovery deemed authentic when offered  
28 by the opposing party. *See Maljack Prods., Inc. v. GoodTimes Home Video Corp.* 81 F3d 881,  
889, fn. 12 (9<sup>th</sup> Cir. 1996). Moreover, other Courts in the Central District have overruled similar  
objections based on technicalities such as submitting electronic signatures of the plaintiff which  
was promptly corrected as is the case here. *See, QBAS Co v. C Walters Intercostal Corp.*, 2010  
U.S. Dist. LEXIS 143945 (C.D. Cal. 2010).

1 Ninth Circuit authority. Notwithstanding these deficiencies, the Ninth Circuit has  
2 made clear that a District Court may not grant "summary judgment simply because a  
3 party fails to file an opposition or violates a local rule" and must "analyze the record  
4 to determine whether any disputed material fact [is] present." *Ahanchian, supra*, 624  
5 F.3d at 1258; *see also Martinez v. Stanford*, 323 F.3d 1178, 1182 (9th Cir. 2003) ("a  
6 nonmoving party's failure to comply with local rules does not excuse the moving  
7 party's affirmative duty under Rule 56 to demonstrate it is entitled to judgment as a  
8 matter of law.")

9 Balancing the four factors discussed above to this case, Plaintiff's counsel has  
10 shown that she inadvertently and in good faith missed the filing deadline for the  
11 Opposition, filed and relied upon JLL 133 which she did not believe, and still does  
12 not believe is privileged, mistakenly e-filed her own declaration in place of  
13 Plaintiff's, and failed to include the court reporter's certification with cited  
14 deposition transcript. None of these errors were her client's fault. The errors did  
15 not delay the proceedings. Plaintiff diligently worked to correct and minimize the  
16 impact of her errors, including by working 50+ hours straight on less than three  
17 hours of sleep. Plaintiff's counsel offered to stipulate to providing JLL additional  
18 time to prepare its Reply brief, which offer JLL declined. There is no evidence that  
19 Plaintiff's counsel acted in bad faith in regards to the errors.

20 Weighing the equities, Plaintiff, by and through counsel, respectfully requests  
21 that the Court find good cause for Plaintiff's late-filed Opposition, including, the  
22 procedural and authentication objections JLL raises, as to Plaintiff's declaration,  
23 Eric Brown's declaration, the court reporter certifications for each deposition relied  
24 upon, and filing and reliance on JLL 133, based on excusable neglect by Plaintiff's  
25 counsel.



1           B.     **Plaintiff Moves To Strike JLL's Objections And Any New Matters**  
2                 **Raised In JLL's Reply Papers.**

3           JLL objects to Plaintiff's citation to JLL 133 on the ground that JLL 133  
4 allegedly contains information that is privileged. Per JLL, "Brown is not permitted  
5 to use this information and has not moved the Court for relief from the privilege  
6 claim" based on FRCP 26(5)(B). JLL's Plaintiff's citation to JLL 133 on the  
7 ground that JLL 133 allegedly contains information that is privileged. Per JLL,  
8 "Brown is not permitted to use this information and has not moved the Court for  
9 relief from the privilege claim" based on FRCP 26(5)(B). JLL's argument and  
10 motion should be rejected. "A District Court need not consider arguments raised for  
11 the first time in a reply brief." *Zamani v. Carnes*, 491 F.3d 990, 997 (9<sup>th</sup> Cir. 2007).  
12 While JLL will likely contend that the alleged Rule 26(b)(5)(B) violations were  
13 unforeseen at the time that JLL filed its moving papers, and only raised in direct  
14 response to Plaintiff's Opposition, since JLL failed to comply with its meet and  
15 confer obligations that required counsel to discuss supporting evidence, JLL's  
16 argument lacks merit as the issues with JLL 133 would have arisen in a proper meet  
17 and confer.

18           In any event, Plaintiff moves to strike JLL's alleged Rule 26(b)(5)(B)  
19 violations because whether or not Plaintiff violated Rule 26 is outside the scope of  
20 this Motion. Further, and in any event, JLL's contention that Plaintiff's reliance on  
21 the one purported attorney-client privileged document at issue does not support  
22 rejection of Plaintiff's Opposition.

23           1.     **It was not Plaintiff's Burden to File a Motion For Relief**  
24                 **From JLL's Unsupported Claim of Privilege and Inadvertent**  
25                 **Production.**

26           JLL claims that as soon as it mailed notification that it asserted an attorney-  
27 client privilege objection to JLL 133 – which it mailed on the last possible day  
28 before the discovery cut off -- March 23, 2016 – after admittedly already waiving

1 the privilege for the last four months, Plaintiff was burdened with filing a motion  
2 and obtaining a Court Order, before he could cite the document as evidence to  
3 oppose JLL's MSJ. As detailed in Plaintiff's Counsel's April 27, 2016, letter, JLL  
4 is simply wrong.

5 The burden to seek relief from any purported attorney-client privilege waiver  
6 lies with JLL. Rule 26(b)(5)(B) is nothing more than a procedural rule. Ninth  
7 Circuit and California Federal Courts do not shift the burden to seek relief from  
8 claimed inadvertent waiver to the party contesting the privilege, let alone, bar them  
9 from relying on the waived evidence. As detailed in Plaintiff's Counsel's  
10 declaration, JLL -- not Plaintiff -- is required first to prove that the attorney-client  
11 privilege applies to JLL 133, a burden JLL has not and can not satisfy.

12 Even if JLL could establish that the email in JLL 133 was privileged, JLL has  
13 not and cannot meet the three conditions under Federal Rule of Evidence 502(b) to  
14 be relieved from waiver: (1) the disclosure was inadvertent; (2) the holder of the  
15 privilege or protection took reasonable steps to prevent disclosure; and (3) the  
16 holder promptly took reasonable steps to rectify the error. *See, Callan v. Christian*  
17 *Audigier, Inc.*, 263 F.R.D. 564, 565-66 (C.D. Cal. 2009). Moreover, merely  
18 demanding that Plaintiff remove and replace claimed privileged documents pursuant  
19 to FRCP 26(b)(5)(B) on March 23, 2016 is insufficient in and of itself to constitute  
20 "reasonable steps to rectify the error."

21 If the Court intends to consider JLL's Objections and Motions to Strike  
22 virtually every paragraph of Plaintiff and his counsel's declarations, and attached  
23 evidence, Plaintiff must be afforded a reasonable opportunity to respond and  
24 respectfully requests that he is permitted to be heard on any new matters raised in  
25  
26

JLL's Reply.<sup>3</sup> See, *Springs Industries, Inc. v. American Motorists Ins. Co.* 137 FRD 238, 240 (ND TX 1991); *Gebretsadike v. Travelers Home & Marine Ins. Co.*, 103

<sup>3</sup> For example, JLL argues that Plaintiff's race harassment and discrimination claims fail because Plaintiff did not personally hear Cordero call him a "Nigger" within one year of filing his EEOC charges on July 1, 2014 and Cordero calling Plaintiff a "Nigger" was merely a stray remark that is hearsay or double-hearsay. JLL is incorrect on all counts. Cordero's use of the term "Nigger" is not being used for the truth of the matter asserted but is evidence of Cordero's racial animus towards Plaintiff and provides a sufficient basis on which a jury could find that Cordero's timely acts, including, but not limited to, telling Plaintiff he could only return to work if he was 100%, assigning Plaintiff physical duties inconsistent with the ACE position, denying Plaintiff use of the office restroom, and similar hostile behavior were substantially motivated by Plaintiff's race. See *Cordova v. State Farm Ins. Co.* (9th Cir. 1997) 124 F.3d 1145 (Finding supervisor's racial slur uttered once, after the employment decision and about someone other than plaintiff was not a stray remark and was sufficient evidence to establish racial bias against plaintiff: "Calling someone a "dumb Mexican" is an egregious and bigoted insult, one that constitutes strong evidence of discriminatory animus on the basis of national origin.")

Moreover, JLL argues that Plaintiff's race harassment claim fails because although Cordero called Plaintiff a "Nigger" on multiple occasions, and treated Plaintiff adversely and against company policy within the statutory period, Plaintiff last heard Cordero use the "Nigger" term more than one year before he filed EEOC charges. Not so. *Singleton v. U.S. Gypsum Co.*, 140 Cal.App.4th 1547, 1561(2006) (finding sexual harassment despite unrelated evidence that harasser was motivated by anger, not sex "What took place between Ross, Umi and Singleton was not "male-on-male horseplay" citing, *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998), but the acting out, on the part of Russ and Umi, of their anger and rage at Singleton. In this connection, we note that there is no requirement that the motive behind the sexual harassment must be sexual in nature. "[H]arassing conduct need not be motivated by sexual desire to support an inference of discrimination on the basis of sex." (*Id.* at 80, accord, *Mogilefsky v. Superior Court*, 20 Cal.App.4th 1409, 1418 (1993). See also. *Birchstein v. New United Moto Mfg., Inc.* 92 Cal.App.4th 994 (2001) (angry staring constituted "sexual harassment" sufficient to demonstrate continuing violation where it arose from harasser's harassing conduct); *Accardi v. Superior Court* 17 Cal.App.4th 341, 350 (1993)(decade long of hostile, but not overtly sexual conduct sufficient to demonstrate continuing sexual harassment where hostile conduct arose out of gender based hostile treatment of plaintiff); *Richards v. CH2M Hill, Inc.* 26 Cal.4th 798, 823-824 (2001) ("[W]hen an employer engages in a continuing course of unlawful conduct under the FEHA by refusing reasonable accommodation of a disabled employee or engaging in disability harassment, and this course of conduct does not constitute a constructive discharge, the statute of limitations begins to run not necessarily when the employee first believes that his or her rights have been violated, but rather either when the course of conduct is brought to an end, as by the employer's cessation of such conduct or by the employee's resignation, or when the employee is on notice that further efforts to end the unlawful conduct will be in vain.")

1 F.Supp.3d 78, 86 (D. D.C. 2015). Plaintiff also requests that the Court consider all  
2 of the evidence submitted from both parties in ruling on JLL's MSJ. Plaintiff  
3 Requests That The Court Seal JLL 133 And Discussions Of The Contents Of JLL  
4 133 In Plaintiff's Opposition Until The Court Is Able To Rule On The Privilege  
5 Issue.

6 Although Plaintiff disagrees that the contents of JLL 133 are protected by the  
7 attorney-client privilege and avers that even if a privilege attached, JLL waived the  
8 privilege, Plaintiff did not intend to disclose information in his papers which was the  
9 subject of a pending privilege objection. To that end, given that JLL has asserted a  
10 privilege objection to the email in JLL 133, Plaintiff requests that the Court seal the  
11 portions of Plaintiff's Opposition, which refer to the allegedly privileged material,  
12 which are: (1) Exhibit "D" to Teren's Declaration, (page 51 of the Exhibits attached  
13 to Teren's Declaration) (Docket #34); (2) Pages 4, 5, 13, 15, 20, 22 and 23 of  
14 Plaintiff's Memorandum of Points and Authorities in Support of Plaintiff's  
15 Opposition to MSJ (Docket #33); and (3) Pages 100-101, 146-151 of Plaintiff's  
16 Response to JLL's Statement of Purportedly Uncontroverted Facts (Docket #35).

17 **IV. CONCLUSION**

18 For the reasons stated above, this Court should grant Plaintiff's *ex parte*  
19 application.

20 DATED: April 29, 2016

TEREN LAW, P.C.

21  
22 

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PAMELA MCKIBBIN TEREN

Attorneys for PLAINTIFF Eric Brown

23  
24  
25 To the extent that JLL relies on *Rope v. Auto-Chlor System of Washington Inc.*, 220 Cal.App.4<sup>th</sup>  
26 635 (2013) to dismiss Plaintiff's retaliation claims that Plaintiff's request for accommodation was  
not protected activity, its holding was directly overruled by Gov't Code Section 12940(m)(2).